

Copyright in the networked world

International complications

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Abstract

Every page on the Web represents an international publication. A client machine in Germany can easily access a server in Michigan, but the copyright laws in the USA differ in a number of significant ways. This column looks at two specific examples, one where there is a difference in the length of protection, and another where German moral rights legislation gives privileges not found in the US law. Although the examples are German and American, similar differences exist between other legal systems.

Introduction

What does an international boundary mean when searching the Web? No passport officer stops your query as it crosses the ocean, and no customs check takes place when you retrieve pages from a foreign server. For most purposes international borders do not exist on the Internet, and librarians so rarely think about international copyright implications for their Web pages that they respond to questions about it with a tone of skepticism that says: "What does this have to do with me?"

This column is dedicated to answering that question with a couple of concrete examples. Although I use US and German copyright law, the issues affect many countries, especially interactions between those who inherited English common law traditions and those who follow continental European legal practice. The US/German example was picked for two reasons:

- (1) Germany has a strong Web presence, and
- (2) the USA and Germany represent different legal traditions.

It helps also that I speak both languages, since up-to-date information about the law is often available only in the language of the country.

Example one

Term of protection

For this example, let us suppose that a library in Michigan decides to scan the following book and to put the digital images on a freely accessible public Web page:

Author: Kühnemann, Eugen, 1868-1946.

Title: *Vom Weltreich des deutschen Geistes, Reden und Aufsätze*, von Eugen Kühnemann.

Publication of information: München, C.H. Beck'sche verlagsbh. (O. Beck) 1914.

Under current US copyright law, the critical information is found in the publication date of the work (1914). Anything published before 1923 is in the public domain (Gasaway, 1999). The reason is the 75-year sliding window that (until this year) put pre-1978 works into the public domain. The new 1998 Copyright Term Extension Act added 20 years to that sliding

window, but did not (according to most interpretations) restore protection to anything that had already fallen into the public domain. This means that under US law, the Michigan-based library could create a derivative digital edition of Kühnemann's work and publish it on the Web without seeking permission.

Under German law, the critical information is not the publication date, but the author's death date. Germany has long calculated the term of protection for intellectual property by adding 70 years to the life of the author. In this case protection would run until 2016. Although the author himself is dead, his heir would have inherited his intellectual property rights, including moral rights relating to any changes, adaptations, or distortions of the work (Schulze, 1998, p. 145). In other words, the work does not lie in the public domain as far as German law is concerned. It is fully protected, and Kühnemann's heir could enforce his ownership rights in court.

If the book were available only within the geographical boundaries of the USA, the protection under German law would make no practical difference. But the Internet's seamlessness means that publication on a server in Michigan is functionally publication in Germany, since every Internet-connected computer in Germany can retrieve a digital copy of the work easily. The potential economic damage from US-only publication would be minimal, since use of the book would likely be limited to a small number of academics who had both the necessary language skills and subject interests.

The potential economic damage of universal access in Germany would be much greater, since language would be no barrier and the subject may well have wider appeal. This means that this hypothetical American Web-based reprint could directly undermine the market for a new paper (or for-cost digital) edition. The more Germans who access this work on the Michigan Web site, the more reason Kühnemann's heir has to go to court and claim damages for infringement. But in this case, with a fundamentally academic book whose economic value as a reprint is probably small, Kühnemann's heir might well work out an acceptable arrangement with the Michigan-based library without going through the courts, and grant them a license to publish.

When and whether a work is protected tends to be the salient question for most people, but it is neither the only issue nor the least problematic.

Distortion and defacement

Suppose the library in Michigan runs Kühnemann's text through an optical character reader (OCR) to create a searchable version. Let us assume also they have an OCR that works well on German and older German type-fonts, and that they edited the output carefully to reduce the error rate to the 99.995 percent level of perfection which is generally considered acceptable for grant work today. That 0.005 percent errors per character still leaves a misspelled word every ten pages or so – more than would be acceptable to most print publishers, and quite possibly more than would seem acceptable to Kühnemann's heir. Even if the heir chose not to complain about the republication of the work, German law would allow a complaint that the OCR'd version represented an unauthorized distortion and defacement.

Distortion and defacement are not copyright issues for text materials under current US law. The US law, and the English common law tradition generally, covers only economic intellectual property rights, and does not address the moral rights topics that form a substantial part of German (and continental European) copyright law. When the USA joined the Berne Convention in 1989, it agreed to add a provision for moral rights in works of visual art (the Visual Artists Rights Act of 1990). But this provision applies only to certain pictorial, graphic, or sculptural work such as paintings, photographs, statues, or architecture, and not to text.

Again some compromises are possible, such as a JSTOR-type solution where only the image is displayed, and the OCR'd text is searched in the background. This could be awkward, though, if the library had already promised an HTML or SGML version as part of a grant proposal. The question of whether the Michigan-based library was actually bound, either legally or ethically, to recognize Kühnemann's heir's complaint would have to be faced.

Example two

Withdrawal of a work

This issue requires a different scenario. Suppose a German student, Herr Schmidt, writes a note to a US mailing list discussion that provokes some lively debate because (for example) it suggests that the Nazi distrust of foreigners was a good thing. He has right-wing Skinhead friends and revels for a while in the controversy. Six months later he has a falling out with his former friends, meets a pretty girl of Turkish ancestry, and suddenly feels embarrassed by his former opinions.

The mailing list discussion maintains an archive, and because of the amount of traffic on the list, it provides mirrored sites, one in Frankfurt, the other in Kansas. Schmidt's messages appear in both, and still have some people referring to them. Under German copyright law, Schmidt has the right to withdraw the previous notes because they no longer reflect his convictions (Schulze, 1998, p. 76). There are some limitations. He could be required to pay some compensation if the mailing list were a money-making enterprise. But this is a purely academic list, they paid him nothing for his submissions and the technical work involved in removing them would be trivial. Schmidt writes to the German site and expects no problem about having his notes removed.

The trouble comes from the fact that the list is mirrored. US copyright law has nothing resembling the right to withdraw a work. Although Schmidt did not transfer copyright, he did give the mailing list an implicit license to send out and archive his notes. He knew full well how the discussion list worked and sent his contributions knowing what would happen with them. The person in charge of the German mirrored site is willing to comply with the withdrawal request, but the Americans balk at it. They feel that the archive should represent an accurate record of the whole discussion, and that removing Schmidt's previous notes would be unethical – it would, in effect, be censoring the history of the list. No US law compels them to comply with the request, and the Kansas mirror site flatly refuses.

If this were a dispute over printed materials, their removal from the German archive would

effectively make them inaccessible to people in Germany. But for a Web-based archive, both the US and German sites must delete Schmidt's submissions to block access from Germany.

Example three

Database protection

To illustrate this issue, let us suppose that a German entrepreneur named Frau Werber hired a staff member to go through the phone books to assemble a database of all the addresses and phone numbers of all the publishers in Germany. She arranged the data in alphabetical order, and then made it freely accessible on the Internet along with a sophisticated search engine. Her intent is to use that database as an example of the wonderful things her search engine could do. She is selling search engines, not databases, even though she has a documentable and non-trivial investment in the data itself. The site is well enough publicized that people in the USA hear about it too.

An American acquisitions librarian in, say, Pennsylvania finds this site. He has no great interest in the search engine, but the database's contents do interest him, because he is building his own database of European publishers that he plans to make freely available to other acquisitions librarians and bibliographers. He is aware of the Feist ruling which says that sweat-of-the-brow effort is not enough to protect a compilation of factual data without some original organizing principle. Since this database, as in the Feist case, is just in alphabetical order, he has no qualms about copying the list of addresses and phone numbers. The interface on the Web site had no clickable contract to make him agree to any limits on the use of the data.

Under German (in fact European Community) law, Frau Weber's data is protected for 15 years after its appearance on the Web (Schulze, 1998, p. 44) because of the investment in gathering it. The protection resembles the proposed US database protection law which failed during the previous session of Congress, but is likely to come up again. Her investment might be too small to worry about if she found out about the infringement, but the existence of a freely available copy on an American Web site

would certainly undermine any efforts to begin to charge for access to the data themselves, if she decided that were a lucrative sideline for her search-engine business.

Jurisdiction

Jurisdiction is one of the key problems in international copyright issues, perhaps the key problem, because it establishes which set of laws would apply if a dispute actually goes to court.

Where should the law apply?

The rule of thumb for jurisdiction under the Berne Convention is “national treatment”. This means that courts should apply the law of “the country where the act infringing copyright takes place” (Geller, 1997, p. 106). In a paper-publication world, that was relatively easy to determine, but the physical location of the infringing act is difficult to establish in a networked environment. A good argument can be made for the server location, since it is acting as the publisher. A good argument can also be made for a client machine since it is receiving the copies and actually displaying them. A further important complication is that an infringement against (in these examples) German law could only be stopped by an injunction in a US court, where no apparent infringement exists.

Courts have naturally been reluctant to face the problem. One of the few Internet-related international cases was decided in June (1999), when an Australian court threw out a defamation case over an article on an American server. A key part of the opinion said:

It may well be that [in another country] the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court (Lean, 1999).

It made no difference that both Australia and the USA belong to the Berne Convention and the World Intellectual Property Organization (WIPO). Those treaties do not give a court in one country authority over people in another. Within the European Union extraterritorial injunctions are possible, but even there exercising them raises complex problems.

One logical extension of this Australian decision would, in effect, leave legal control to the copyright laws of the country where the server sits, because only the courts of that country have the power to compel obedience. This would localize the jurisdiction, but as a general rule it might also encourage copyright-free havens in host countries that thought they could profit from the infringing servers.

To whom should the law apply?

A further complication comes from differences in the way the law defines to whom it applies. US law applies generally to US citizens, residents of the USA, and to publications within the geographic borders of the USA (see 17 USC 104). This seems fairly straightforward, and the German law makes what seems like a parallel claim, but also applies to “Deutsche im Sinne des Artikels 116 Abs. 1 des Grundgesetzes, die nicht die deutsche Staatsangehörigkeit besitzen...” (“Germans in the sense of Article 116, section 1, of the Constitution, who do not possess German citizenship...” my translation) (*Gesetz über Urheberrecht*, 1998). This article includes anyone who had citizenship in the German Reich as of 31 December 1937, or had been established as a refugee or a displaced person of German ethnic identity, or their spouse or immediate descendants[1]. In other words, the German copyright law could apply in theory to the children of Germans who fled the Third Reich, including the (American) author of this column.

At present this jurisdictional conflict means little, since in practice the law continues to be applied by physical location. But if future attempts to deal with international copyright issues were to broaden the application of national laws, it could conceivably mean that someone like me to whom German law theoretically applied could claim moral rights privileges (such as withdrawing an article) that do not exist in the US legal code.

Consequences

It is no accident that these examples all show a US infringement against German law. The US law has had shorter terms for protection and

gives individuals many fewer rights, largely because it recognizes few of the moral rights that make up much of the German law. It is far easier for American servers to infringe against German law, than the reverse. The situation was similar for print materials in the nineteenth century, when American publishers notoriously infringed against foreign (particularly English) rights holders. The real difference today, particularly for libraries involved in digitization and other Web-based projects, is that the infringement is not blatant and for-profit, but unintentional, even unknown.

The legal risk for the Americans for any of the infringements described above is small, which also means that the likelihood of legal enforcement of rights that German intellectual property owners enjoy is also small. In such a situation, the issue becomes less a legal than an ethical one. Should American (and other common law tradition) librarians routinely respect rights from another legal system, even though doing so might mean having to abandon a favorite project or to go about it by other means with more work and more expense? And if the answer is yes, how should one decide when and what to do?

The real consequences of international Internet infringements may well come from the damage misunderstandings could do to the cooperative relationships and projects which important American and German institutions (such as the Association of Research Libraries, the Deutsche Forschungsgemeinschaft, and the National Science Foundation) have encouraged. Each country's copyright law embodies a set of assumptions that make up part of the partners' cultural expectations. Often these expectations represent issues which partners do not think to discuss because they imagine the differences are unimportant or purely technical. And sometimes they are. But that can change fast when, as in the examples above, one member's right to control clashes with another's right to take.

Conclusion

The goal of the column is not to propose solutions, which will in any case require years of diplomatic negotiation and legislative action, but to increase the awareness of the problem. And awareness in a practical sense requires sources of information. The references below contain a number of these, both Web- and print-based, for information about German copyright law. The book by Gernot Schulze is particularly clear and well written, but, like the Web sites, is entirely in German. The English-language sources tend naturally to be less up-to-date. I will say more about them, and other international copyright issues, in future columns.

Note

- 1 <http://www.rewi.hu-berlin.de/Datenschutz/Gesetze/gg.html>

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